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No. 635

In the Supreme Court of the United States

OCTOBER TERM, 1961

ABRAHAM KABOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–15a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1961. Petitioner's motion for a rehearing was denied on November 28, 1961. The petition for a writ of certiorari was filed on December 26, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether on charges of offering and giving a bribe petitioner was entitled to an instruction on entrapment where the evidence alleged to raise that

defense was that a government official attempted to extort a gratuity for personal gain.

2. Whether electronic recordings, which tended to substantiate verbal testimony that petitioner offered to give a gratuity, were properly received in evidence.

3. Whether the court's instruction as to character evidence was erroneous.

STATUTES INVOLVED

Section 201 of Title 18 U.S.C. provides as follows:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing

or imprisoned not more than three years, or both.

This section shall not apply to violations of section 212 of this title.

Section 202 of Title 18 U.S.C. provides as follows:

Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust, or profit under the United States.

This section shall not apply to violations of section 213 of this title.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on both counts of an indictment charging him with offering and giving a bribe to an

internal revenue agent (I R. 7–8, 619).[1] He was sentenced to concurrent terms of imprisonment of eighteen months on each count (I R. 627–628). The court of appeals affirmed (Pet. App. 1a–15a). The evidence may be summarized as follows:

1. In July 1958, Keyser, an internal revenue agent attached to the International Operations Division, was assigned to auditing in New York City the income tax returns of Salomon van Berg, his son Bart van Berg, their respective wives, and the corporate returns of two companies controlled by them, Van Berg Diamonds and Rough Diamonds. The audit, which was to cover the years 1954 through 1957, was occasioned by a report that Salomon van Berg had withdrawn two million dollars from another family corporation in Puerto Rico, which sold its diamonds to the two New York corporations. The purpose of the audit was to determine (1) whether this withdrawal should be taxed as a dividend to the elder van Berg and (2) whether there should be a reallocation of profits between the Puerto Rican company which enjoyed a tax advantage by reason of its location and showed a profit of 47% on its operations, and the Van Berg Diamonds Company in New York, which paid the usual corporation taxes and showed a profit of only 2% (I R. 35–38). At the beginning of the audit, this purpose was explained to the taxpayers and to petitioner, a partner in the accounting firm which prepared their tax returns (I R. 38–39, 40–41).

[1] "I R." and "II R." refer, respectively, to the appellant's and the government's appendices in the court of appeals.

2. The evidence of central importance to the issues raised by the petitioner relates to a defense claim that pressure was brought to bear upon the taxpayers and upon petitioner during the course of the audit to pay a bribe to Keyser and to another internal revenue agent, Gillis, in order to obtain a favorable report on the individual and corporate tax liabilities. The court admitted this evidence, over a government objection, but in its charge instructed the jury to disregard it and at the same time refused petitioner's request to instruct on entrapment (I R. 595, 622–625).

a. Petitioner and other members of his accounting firm testified that on the occasion of Keyser's first visit to their office he mentioned that he was acquainted with another internal revenue agent who was in the New York office, Maurice Gillis, and that he was going to try to get him assigned to this case (I R. 434, 454, 499–500). Several days later, according to the testimony of petitioner and Groothuis, another member of the accounting firm, Gillis came to the office at lunch time and said he would like to talk with them. At lunch Gillis stated that he had been a friend of Keyser for a number of years; that Keyser wanted them to know that he (Keyser) was "a very rough and tough agent," and he was going to do his best to see that their client knew it. The two expressed indignation at this and threatened to report the conversation and take it up with Keyser; Gillis then asked them to forget the conversation (I R. 435–439, 508–510). Petitioner testified that he later told

Keyser that Gillis had come to see them and had discussed the case, which petitioner did not like; that Keyser said he was sorry that it had happened, but that they would get along all right (I R. 511–512).

Petitioner testified that about October 7–9 Keyser talked with the elder van Berg and told him that he had a tax liability which could run into millions (I R. 513–515). Before leaving for Washington, Keyser mentioned that he was going out to Gillis' home for dinner (I R. 517).

Upon his return to New York on October 27, petitioner testified, Keyser was in petitioner's office discussing the case (I R. 518–523). With petitioner's permission, Keyser called Gillis and invited him to have lunch with them. There was no discussion of the case at lunch (I R. 523–525). That afternoon, while walking down Fifth Avenue with Keyser, petitioner suggested that if Keyser had to get a tax out of the case he was not going to get it on the dividend issue, but if it could be done by making some reallocations of profits or expenses and the amount was reasonable, he would try to get the van Bergs to agree. He might have said that everybody would be happy if they could get rid of the case, but did not suggest that any money would be paid to Keyser (I R. 530–531).

b. Keyser testified that when he first went to petitioner's office he mentioned that he knew Maurice Gillis in the New York office, and that it developed that petitioner also knew Gillis. Later, in October, petitioner said that he had seen Gillis and suggested that the three of them have lunch together, which they

did, no mention being made of the tax matter (I R. 44–46).

About October 9, Keyser discussed with the elder van Berg the two million dollar dividend or loan from the Puerto Rican corporation, the reallocation of profits between the Puerto Rican company and the New York company, and the further item, recently discovered, of a credit on the books of the New York company in the amount of three hundred thousand dollars. He told van Berg that he was going to recommend that the two million dollar item be taxed as a dividend and that he was going to give further consideration to the reallocation issue after he came back from Washington (I R. 40–41).

On October 27, Keyser testified, he told petitioner at his office that he was going to recommend that the two million dollar and three hundred thousand dollar items be taxed as dividends to van Berg, making his additional tax approximately $1,929,000, and that the reallocation of profits and expenses between the Puerto Rican and the New York companies would result in an additional corporate tax of approximately $460,000 (I R. 42). Petitioner asked if the matter could be handled without going to a higher level and Keyser replied that he would be glad to consider any additional evidence (I R. 43). Following a visit to the van Berg office, as they were walking down Fifth Avenue, petitioner apologized for bringing the matter up, but said that he had discussed the matter with Gillis, who thought it would be all right to bring it up with Keyser. He then asked if there was not some-

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thing he could do to make Keyser and everybody else happy and dispose of the matter without carrying it to a higher level (I R. 43–44). Keyser testified that the following morning he called his supervisor in Washington and said that he thought that he was going to be offered a bribe. The same morning, inspectors Kiely and Sweeney of the Internal Revenue Service came to Keyser's hotel room, instructed Keyser not to make any overtures to petitioner but to go along with any offer he might make, and placed a Minifon device on his person (I R. 46–47, 134, 237, 333).

Keyser then went to petitioner's office and discussed his report. Petitioner suggested that they should be able to close the case on a mutually advantageous basis, perhaps to show an additional tax of from fifty to seventy-five thousand dollars, which petitioner would recommend paying. Petitioner said that he would get an affidavit from the van Bergs that the withdrawals were loans. He then dropped his voice and said he could get Keyser about twenty-five thousand dollars. He also suggested that the matter could be arranged through Gillis, which Keyser rejected (I R. 56–57).

On October 30, Keyser, again with a Minifon placed on him, went with Gillis to a restaurant (I R. 131, 325). Gillis said that Keyser should not be surprised if petitioner tried something, that "most CPA's or attorneys would try to settle a case with an agent if they thought they could do something for the agent" (II R. 259). The recording was concededly bad (I R.

308, 327) and the court refused to have it played for the jury (I R. 417).[2]

Keyser testified that on November 13 there was a further conversation between Keyser and petitioner, during which a reduced tax liability and the payment of twenty-five thousand dollars was discussed (I R. 62–65). That afternoon petitioner came to Keyser's hotel room, which was monitored by microphones leading to an adjoining room, where inspectors Kiely and Sweeney listened. At this time there was a discussion of Keyser's report and what would happen if the review section disapproved it (I R. 66–68).

On November 19, again equipped with a Minifon, Keyser went to petitioner's office. He showed petitioner a report indicating a tax liability for the corporation of approximately seventy-seven thousand dollars and for the elder van Berg of approximately eight thousand dollars. There was a discussion of further revision of the report and petitioner said that he would turn over the money to Keyser that afternoon in a taxicab (I R. 71–75). Before Keyser left his hotel room that afternoon, the inspectors searched him and his brief case, finding about forty dollars on his person. At petitioner's office Keyser showed his revised reports and picked up the signed agreement forms, and Keyser and petitioner left together in a taxicab. After proceeding a short distance, petitioner

[2] Keyser also made a full explanation of his relations with Gillis (II R. 70, 255–256; I R. 92–93, 99–100). The United States Attorney stated early in the trial of the case that it was doubtful that Gillis would be called as a government witness, but that he was available to anybody who wanted to call him (I R. 85).

opened his brief case and drew out a white manila envelope which he handed to Keyser saying, "Here are these papers I promised to you." Petitioner got out of the taxicab shortly thereafter and the two inspectors who were following in a government car, after receiving a nod from Keyser, arrested petitioner (I R. 76–80, 281–282, 284–285). Sweeney opened Keyser's brief case and withdrew a manila envelope, enclosing a white envelope containing twenty-five thousand dollars. Petitioner denied that he had given the money to Keyser (I R. 80–81, 358).

c. Petitioner reiterated this denial on the stand, stating that there had been no promise of a payment to Keyser, that he was in the taxicab at Keyser's invitation to drop him off at a client's office, that he did not pass Keyser anything, and that he had never seen the manila envelope before (I R. 551–562).

The various recordings were played for the jury, but were in large part inaudible (I R. 82–83, 270–271, 275, 280, 304, 307, 308, 597).

3. The trial court ruled that no instruction on entrapment was justified because that defense was inconsistent with petitioner's testimony that he had not offered or given a bribe (I R. 579–580, 595). The court of appeals found it unnecessary to reach the question of inconsistent defenses because it found that there was no evidence to raise the issue of entrapment. It held that conduct of dishonest government employees acting contrary to the interests of the government would not involve entrapment since entrapment involves inciting to crime on behalf of the government (Pet. App. 12a).

ARGUMENT

1.a. As the courts below concluded, petitioner's evidence did not raise the defense of entrapment. An essential element of the defense is that government officials "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells* v. *United States*, 287 U.S. 435, 441, 442, 444. Similarly, Mr. Justice Roberts, concurring in *Sorrells*, stated that the instigation of the offense may not be permitted "for the sole purpose of obtaining a victim through indictment, conviction and sentence." *Id.* at 454. See also the majority and concurring opinions in *Sherman* v. *United States*, 356 U.S. 369, 372, 376, 384, stating that, in order for entrapment to be present, the purpose of the enticement must be to gain evidence.

It is particularly clear in the case of the offense of bribery that only acts of government agents performed for governmental purposes can constitute entrapment. The consummated offense of bribery involves two guilty parties, the private giver of the bribe and the official who takes it. Each is equally guilty. Each is an accomplice of the other within the rule requiring corroboration of a witness' testimony, although they are punished under different statutes. *Egan* v. *United States*, 287 Fed. 958 (C.A.D.C.).[4] Thus, where the offense has been completed with no motive other than that of personal gain on the part of either

[4] There may also be a conspiracy between the giver and the taker of the bribe. *Ex parte O'Leary*, 56 F. 2d 515 (C.A. 7), certiorari denied, 283 U.S. 830.

party, neither can defend on the ground that the whole idea originated with the other. Just as a man is not excused from joining a conspiracy to commit a crime by the fact that the crime was suggested or induced by a co-conspirator, so the giver of a bribe cannot claim that he was entrapped by a government official seeking a bribe for his own private gain.

We accept at its full face value, as we must in order to test its legal sufficiency, petitioner's evidence concerning the inception of this alleged scheme. This evidence, however, shows that Gillis, who petitioner claims made the approach to petitioner in this case, was acting for his own corrupt purposes. The evidence does not even suggest, and petitioner does not claim, that Gillis was acting on behalf of the government. In fact, Gillis was not even assigned to the case. When, as here, an approach is made by a government official for his own selfish gain, it is the duty of the private citizen to resist the temptation or pressure.

Petitioner emphasizes that on October 28, 1958, Keyser reported to his superior that he might be offered a bribe and that he then actively engaged in gathering evidence upon which to base a bribery prosecution. These facts, however, do not change the fundamental situation. Even assuming the motive petitioner attributes to Keyser—that he had lost his nerve and was working against his former confederate—there is nothing in the evidence to show that Keyser subjected petitioner to any pressure after that day to continue with the corrupt plan which had already been begun. Cf. *United States* v. *Klosterman*,

248 F. 2d 191 (C.A. 3). All the evidence is that petitioner proceeded willingly, with Keyser merely going along with him. Artifice and strategem in dealing with a willing law violator do not constitute entrapment. See *Sorrells* v. *United States, supra,* 287 U.S. at 441; *Sherman* v. *United States, supra,* 356 U.S. at 372.

b. The court of appeals properly held that it was unnecessary to reach the question whether the defense of entrapment may be invoked by a defendant who takes the stand and unequivocally denies any participation in the offense. As we have shown above, the only evidence in the record offers no support whatsoever for the defense.

In any event, the district court was correct in holding that petitioner was not entitled to instructions as to entrapment since his own version of the facts contradicted the entire theory of the defense. A number of decisions have held or stated that a defendant in such a situation may not rely upon entrapment. *Eastman* v. *United States,* 212 F. 2d 320, 322 (C.A. 9); *Rodriguez* v. *United States,* 227 F. 2d 912 (C.A. 5); *Hamilton* v. *United States,* 221 F. 2d 611 (C.A. 5); *Siglar* v. *United States,* 208 F. 2d 865, 868 (C.A. 5), certiorari denied, 347 U.S. 991; *United States* v. *Pagano,* 207 F. 2d 834 (C.A. 2). On the other hand, as petitioner argues (Pet. 19), instructions on entrapment have in fact often been given where commission of the offense has been denied. The Fifth Circuit has suggested in *Henderson* v. *United States,* 237 F. 2d 169, that the availability of the defense may depend to some extent upon the degree of contradiction involved between the defendant's version of the facts

and the defense of entrapment in the particular circumstances. If that is the correct approach, the situation here presents a case of square contradiction. Petitioner categorically denied any negotiations looking toward a bribe or the passing of the twenty-five thousand dollars found in Keyser's brief case after petitioner left their jointly occupied taxicab.

c. Since it was ultimately irrelevant whether Gillis did or did not have a plan for receiving a bribe, error cannot be predicated upon the government's failure to call him as a witness. Moreover, Gillis was made available to the defense, if it wished to call him. There was no suggestion during the trial that the court should call him as a witness. The trial court was under no duty to pursue *sua sponte* such a tangential inquiry.

2. The electronic recordings introduced in this case were properly admitted under this Court's decision in *On Lee* v. *United States*, 343 U.S. 747. As the court of appeals held (Pet. App. 11a), the recordings were not obtained by trespass or by any other illegal activity of federal officers.

Moreover, the recordings seem to have had relatively little significance in the trial of this case. In the first place, the transcripts of the recordings were excluded by the trial court (I R. 300–301). The recordings themselves were very difficult to understand, the trial judge stating in his charge that, in his opinion, they were largely inaudible (I R. 597). Thus, they could have had little effect on the jury beyond Keyser's own testimony concerning the conversations. In the second place, the probative weight of the recordings related principally to the first count,

the offering of a bribe. As to the second count, the giving of a bribe, the evidence was conclusive (see the Statement, *supra*, pp. 9–10). This evidence consisted largely of the testimony of inspector Kiely, concerning whose integrity petitioner's counsel expressed the greatest confidence in his summation to the jury (II R. 203). Inasmuch as the sentences were concurrent on both counts, the recordings had little ultimate significance.[4]

3. The instruction on character evidence[5] was proper under this Court's decision in *Edgington* v. *United States*, 164 U.S. 361. It was virtually iden-

[4] While petitioner objects to the government's introduction of the recordings, he claims (Pet. 23–25) that the trial court erred in excluding the recordings of the Keyser-Gillis conversation on October 20 (see *supra*, pp. 8–9). As petitioner himself conceded and the court of appeals held (after listening to it) (I R. 308; Pet. App. 10a), the recording was largely unintelligible. Therefore, the court of appeals correctly held that "[s]ince so small a part of the conversation was intelligible from the recording, and its meaning not clear, it was not error to keep it from the jury. If it be considered error, it appears harmless in the circumstances" (Pet. App. 10a).

[5] The instruction reads as follows (I R. 600–601): "Now there has been testimony here to the previous good character of the defendant. You should consider such evidence of character together with all the other facts and all the other evidence in the case in determining the guilt or innocence of the defendant. Evidence of good character may in itself create a reasonable doubt where without such evidence no reasonable doubt would have existed. But if on all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty, a showing that he had previously enjoyed a reputation of good character, does not justify or excuse the offense and you should not acquit a defendant merely because you believe he is a person of good repute. It may be that those with whom he had come into contact with previously have been misled and he did not reveal to them his true character."

tical with that approved in *United States* v. *Crosby*, 294 F. 2d 928, 947 (C.A. 2). This case does not, as petitioner suggests (Pet. 28), present the issue whether character evidence alone may create a reasonable doubt on which various circuits takes differing views. Here the trial court instructed that "evidence of good character may in itself create a reasonable doubt where without such evidence no reasonable doubt would have existed" (I R. 600).*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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* The charge was also correct in instructing the jury that they need not consider the correct amount of tax to be assessed against petitioner's clients (I R. 593). While some evidence of this matter inevitably came into the case as background for the alleged offense, the amount of the tax was not itself an issue, as petitioner's counsel conceded during the trial (II R. 185). Contrary to petitioner's suggestion (Pet. 27) the charge did not instruct the jury not to consider the tax as bearing on the motive of petitioner in the alleged bribery. Instead, the charge explicitly said that the tax should be considered in connection with the issue of "whether, if you believe it to be a fact, the offer to bribe or the bribe itself was made with the intent to influence [Mr. Keyser's] decision in that matter" (I R. 593).

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